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Supreme Court, U.S.
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NO. 91-1882

# IN THE SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1991

STANLEY J. STEWART
*Petitioner,*

V.

PARISH OF JEFFERSON, et al
*Respondents.*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Whether the speech of a public employee who reports the sexual harassment of a co-worker constitutes a matter of inherent public concern warranting First Amendment protection.

Whether the Fifth Circuit incorrectly concluded as a matter of law that no portion of petitioner's speech involved a matter of public concern, when the court acknowledged as fact that petitioner several times, over a period of four months reported the sexual harassment of a co-worker.

## PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are Stanley Stewart, Harold Pete, Harold Schomaker and the Parish of Jefferson, Louisiana.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| PARTIES | ii |
| TABLE OF CONTENTS | iii |
| TABLE OF AUTHORITIES | iv |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 1 |
| STATEMENT OF THE CASE | 3 |
| A. Statement of the Facts | 3 |
| B. Prior Proceedings | 4 |
| REASONS FOR GRANTING THE WRIT | 5 |
| A. Speech reporting sexual harassment in the workplace constitutes a matter inherently of public concern. | 6 |
| B. The Fifth Circuit misapplied the *Connick* content, form and context analysis | 7 |
| CONCLUSION | 11 |


## APPENDIX


Appendix A: Opinion of the United States Court of Appeals for the Fifth Circuit ..... A-1

Appendix B: Minute Entry of the United States District Court for the Eastern District of Louisiana ..... B-1

Appendix C: Judgment of the United States District Court for the Eastern District of Louisiana ..... C-1

Appendix D: On Petition for Rehearing and Suggestion for Rehearing En Banc ..... D-1

## TABLE OF AUTHORITIES

**Cases** **Page**

*Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684 (1983) ..... 6, 8, 9, 10
*Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 99 S. Ct. 693 (1979) ..... 8, 9
*Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399 (1986) ..... 6
*Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731 (1968) ..... 8
*Rankin v. McPherson*, 483 U.S. 378, 107 S. Ct. 2891 (1987) ..... 5, 6, 8
*American Postal Worker's Union v. United States Postal Service*, 830 F.2d 294 (D.C. Cir. 1987) ..... 8
*Auriemma v. Rice*, 910 F.2d 1449 (7th Cir. 1990) ..... 11
*Breuer v. Hart*, 909 F.2d 1035 (7th Cir. 1990) ..... 8
*Bryson v. City of Waycross*, 888 F.2d 1562 (11th Cir. 1989) ..... 8
*Crain v. Board of Police Commissioners*, 920 F.2d 1402 (8th Cir. 1990) ..... 8
*Czurlanis v. Albanese*, 721 F.2d 98 (3d Cir. 1983) ..... 8
*Donahue v. Windsor Locks Board of Fire Commissioners*, 834 F.2d 54 (2d Cir. 1987) ..... 10
*Lewis v. Blackburn*, 734 F.2d 1000 (4th Cir. 1984) ..... 8
*Matulin v. Village of Lodi*, 862 F.2d 609 (6th Cir. 1988) ..... 8
*Pollard v. City of Chicago*, 643 F.Supp. 1244 (N.D. Ill. 1986) ..... 6
*Roth v. Veteran's Administration*, 856 F.2d 1401 (9th Cir. 1988) ..... 8
*Vasbinder v. Ambach*, 926 F.2d 1333 (2d Cir. 1991) ..... 8
*Wulf v. City of Wichita*, 883 F.2d 842 (10th Cir. 1989) ..... 8

**Constitutional Provision and Statute**

U.S. Const. Amend. I ..... 1
42 U.S.C § 1983 ..... 2, 4

**Other Authorities**

29 C.F.R. § 1604.11(a)(3) ..... 7
C. MacKinnon, *Sexual Harassment of Working Women* (1979) ..... 6

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *Stewart v. Parish of Jefferson, et al.*, and appears in Appendix A. The Judgment of the United States District Court for the Eastern District of Louisiana, *Stanley J. Stewart v. Parish of Jefferson, et al.*, appears in Appendix C. The reasons for judgment of the United States District Court for the Eastern District of Louisiana, *Stanley J. Stewart v. Parish of Jefferson, et al.*, appear in an unpublished minute entry in Appendix B.

## JURISDICTION

The opinion of the Fifth Circuit Court of Appeals was rendered on January 28, 1992. A timely filed petition for rehearing was denied on February 24, 1992. In accordance with Rules 13.1 and 13.4 of this Court, this petition is filed within 90 days of the Fifth Circuit's denial of a timely filed petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1988) because the Fifth Circuit decided an important question of federal constitutional law in a manner inconsistent with the precedents of this Court.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983 (1988) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE

This case presents the question whether the speech of a public employee who reports the sexual harassment of a co-worker involves a matter of public concern warranting First Amendment protection. The Fifth Circuit accepted as fact that petitioner several times, over a period of four months reported his supervisor's sexual harassment of a co-worker, but found as a matter of law that petitioner's speech involved "matters *only* of personal interest" and thus was constitutionally unprotected. *Stewart v. Parish of Jefferson*, No. 91-3078, West slip op. 2209, 2209, 2211 (5th Cir. Jan. 28, 1992) (emphasis supplied).

### A. Statement of the Facts

Petitioner Stanley Stewart was employed by the Jefferson Parish Department of Public Works from 1970 until 1989. In 1978 one of Stewart's co-workers, Joyce Breaud, was allegedly coerced into a sexual relationship with their supervisor, Harold Pete. Breaud claims that Pete intimidated her and that she feared she would lose her job if she resisted. In 1987, the Parish of Jefferson issued a memorandum prohibiting sexual harassment in the workplace. Encouraged by this memorandum, Breaud informed Pete that she wished to end the coerced relationship. At that point Pete began to harass her on the job in an effort to bring her back into the relationship. Pete also began to harass petitioner, who had developed a friendship with Breaud. Pete demanded that petitioner inform him of Breaud's activities during and after work, especially whom Breaud was seeing socially after work. Pete also threatened petitioner with demotion if he should report Pete's conduct to his superiors.

In December 1987, petitioner spoke to Personnel Supervisor Phil Rupp about taking steps to stop Pete's sexual harassment of Breaud, as well as halting Pete's harassment of himself.

In January and February of 1988 petitioner and Breaud spoke to Pete's supervisor, Harold Schomaker, about the sexual harassment of Breaud and the related harassment of petitioner. In March 1988 petitioner spoke to Schomaker's supervisor, William M. Lavelle, about Pete's sexual harassment of Breaud.

Pete's harassment of Breaud and petitioner intensified after petitioner reported Pete's conduct to Phil Rupp in December. In January 1988, petitioner was admitted to Ochsner Hospital for severe stress-related anxiety after Pete confronted him about Breaud in a particularly violent and threatening manner. In March 1988 petitioner was removed from Pete's supervision and in May 1988 was placed under the supervision of Harold Schomaker, whom petitioner alleges also harassed him. In December 1988 petitioner was assigned to a team whose duty it was to enter sewers to check drainage pipes. This function was not a job duty of an Engineering Inspector II, petitioner's position. When petitioner refused to enter the sewers because of a fear of snakes and rats, he was demoted to the position of a laborer (Sign Technician I). The person who replaced Stewart was not required to enter the sewers. Petitioner's nervous conditions worsened during this period, and he was discharged in August 1989 after taking a medical leave of absence.

B. Prior Proceedings

Petitioner filed suit in federal district court against the Parish of Jefferson, Harold Pete, and Harold Schomaker for violations of his First Amendment right to freedom of speech, violation of his civil rights under 42 U.S.C. § 1983, and pendant state law tort claims. On defendants' motion, the district court granted summary judgment on the issue of whether petitioner's speech was protected under the First Amendment. On appeal, a three-judge panel affirmed the granting of summary judgment. Petitioner's petitions for panel rehearing and rehearing en banc were subsequently denied.

## REASONS FOR GRANTING THE WRIT

Sexual harassment in the workplace is unquestionably a matter of public concern. The attention given in the media and in academia to the subject of sexual harassment illustrates that it is a matter of acute contemporary public interest. Further, the public policy against sexual harassment in the workplace, reflected in our civil rights laws, is well-established. In a government workplace sexual harassment is especially deplorable, and is undoubtably a matter of public concern.

By holding that petitioner's speech alleging the sexual harassment of a co-worker did not involve a matter of public concern, the Fifth Circuit's decision conflicts with the precedents of this Court and with the decisions of several other circuits. This Court has recognized that some speech involves matters of inherent public concern. Sexual harassment, like racial discrimination, is undoubtably among those matters. In reaching its conclusion, the Fifth Circuit seriously misapplied the content, form and context analysis used by this Court for judging the public or private character of speech.

The Fifth Circuit's decision is wrong as a matter of policy as well as of law. The decision restricts protection of public employees who report the sexual harassment of co-workers. Consequently, if allowed to stand the decision will frustrate laws designed to eliminate sexual harassment from the workplace by discouraging the intervention of co-workers when sexual harassment exists.

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The threshold question for determining whether the speech of a public employee is protected under the First Amendment is whether the speech may be "fairly characterized as constituting speech on a matter of public concern." *Rankin v. McPherson*, 483 U.S. 378, 385, 107 S. Ct. 2891, 2897 (1987)

(quoting Connick v. Myers, 461 U.S. 138, 146, 103 S. Ct. 1684, 1690 (1983)). Whether the speech involves a matter of public concern "must be determined by the content, form and context of a given statement, as revealed by the whole record." *Id.* However, this Court has recognized that some speech may involve "a matter inherently of public concern." *Connick v. Myers*, 461 U.S. 138, 148 n.8, 103 S. Ct. 1684, 1691 n.8 (1983). If the employee's speech involves a matter of public concern, the inquiry then advances to a balancing of the public employee's interest in speaking on matters of public concern with the public employer's interest in maintaining an efficient and disciplined workplace. *Rankin*, 483 U.S at 384, 107 S. Ct. at 2896-97 (citing Pickering v. Board of Education, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734-35 (1968)).

A. *Speech reporting sexual harassment in the workplace constitutes a matter inherently of public concern.*

This Court has recognized that some speech may involve "a matter inherently of public concern." *Connick v. Myers*, 461 U.S. at 148 n.8 (citing Givhan v. Western Line Consolidated School District, 439 U.S. 410) (speech concerning allegedly racially discriminatory policies of school district)).

Speech reporting sexual harassment in the workplace, like speech concerning racial discrimination, is inherently of public concern. *Pollard v. City of Chicago*, 643 F.Supp. 1244, 1249 (N.D. Ill. 1986). *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63-66, 106 S. Ct. 2399, 2404-05 (1986); New York Times, Oct. 15, 1991, at A20 (opinion poll on sexual harassment); Time, Oct. 14, 1991 (Nation section) (article relating to sexual harassment); *see generally* C. MacKinnon, *Sexual Harassment of Working Women* (1979).

Further, the public policy of the United States against sexual harassment in the workplace is well-established. Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sex. EEOC guidelines specify that sexual harassment is

a form of sexual discrimination prohibited by Title VII. The guidelines provide that unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. Employers must take all necessary steps to prevent sexual harassment in the workplace. 29 C.F.R. § 1604.11(a)(3).

There can be no doubt, given the overwhelming public focus on eliminating sexual harassment in the workplace, that allegations of sexual harassment in a government workplace constitute a matter of inherent public concern.

B. *The Fifth Circuit misapplied the* Connick *content, form and context analysis.*

The Fifth Circuit misapplied the content, form and context analysis to conclude that "Stewart was speaking *as an employee* upon matters *only* of personal interest." *Stewart v. Parish of Jefferson*, No. 91-3078, West slip op. at 2211 (5th Cir. Jan 28, 1992) (second emphasis supplied).

Examining the content, the court recognized that petitioner's speech involved two matters. One was "the personal abuse of Stewart by Pete because of his friendship with Breaud," and the second was "Stewart's speech on behalf of Breaud." *Id.* The court had already acknowledged in its recitation of facts that Stewart "complain[ed] of Pete's alleged sexual harassment of Breaud and his related harassment of Stewart." *Id.* at 2209. Thus, its conclusion that the content of Stewart's speech involved matters "only of personal interest" is incorrect: although the part of Stewart's speech reporting Pete's harassment of Stewart (an extension of the sexual harassment of Breaud) arguably may have been a matter of interest exclusive to Stewart, Stewart's speech reporting Pete's alleged sexual harassment of a subordinate involves a matter of obvious public concern.

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*The "content" of speech is a question of fact, not of law.*

The literal, factual content of speech determines whether the "content" of speech touches on a matter of public concern. In *Connick*, for example, this Court acknowledged that the factual content of one of Myers' questions in her questionnaire — whether assistant district attorneys felt pressured to work in political campaigns — involved a matter of public concern requiring a *Pickering* balancing of interests. *Connick*, 461 U.S. at 149. The other precedents of this Court have followed the same approach, as have virtually all of the other circuits.[1] In

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[1] See *Rankin v. McPherson*, 483 U.S. at 382 & n.3, 386 & n.10 (references to the literal content of Rankin's speech as starting point for First Amendment analysis); *Givhan v. Western Line Consol. School Dist.*, 439 U.S. at 412-13 (First Amendment analysis based on district court's factual finding that Givhan's speech addressed allegedly racially discriminatory policies); *Pickering v. Board of Education*, 391 U.S. at 569-70 & n.2, 575 & app. (reprint of Pickering's letter published in newspaper as basis for analysis); *Vasbinder v. Ambach*, 926 F.2d 1333, 1336, 1340 (2d Cir. 1991) (rehabilitation officer's speech reported potential fraud, theft, and misallocation of funds); *Breuer v. Hart*, 909 F.2d 1035, 1036-38 (7th Cir. 1990) (deputy sheriff's allegations that sheriff stole public property); *Crain v. Board of Police Commissioners*, 920 F.2d 1402, 1411 (8th Cir. 1990) (police officer's written complaint alleged racial discrimination); *Bryson v. City of Waycross*, 888 F.2d 1562, 1564, 1566 (11th Cir. 1989) (police captain's written complaint alleged corruption in police department); *Wulf v. City of Wichita*, 883 F.2d 842, 849-50, 857-58 (10th Cir. 1989) (police officer's letter to attorney general alleging misuse of public funds and sexual harassment); *Roth v. Veteran's Administration*, 856 F.2d 1401, 1403-06 (9th Cir. 1988) (physician's allegations of statutory violations); *Matulin v. Village of Lodi*, 862 F.2d 609, 611-13 (6th Cir. 1988) (police officer's speech alleged sex and handicap discrimination); *American Postal Worker's Union v. United States Postal Service*, 830 F.2d 294, 297, 313 & app. (D.C. Cir. 1987) (analysis based on content of postal employee's letter in union newsletter); *Lewis v. Blackburn*, 734 F.2d 1000, 1002, 1005 (4th Cir. 1984) (magistrate's criticism of duties delegated to her); *Czurlanis v. Albanese*, 721 F.2d 98, 100, 104 (3d Cir. 1983) (public employee's speech revealed possible fraud).

contrast, the Fifth Circuit refused to accept the factual content of petitioner's speech alleging sexual harassment of a co-worker, choosing instead to *interpret* petitioner's allegations of sexual harassment as speech concerning "a soured personal relationship [rather] than sexual harassment." *Stewart* at 2211. This is hardly judicial restraint.

In examining the form and context, the court cited as significant the fact that petitioner reported Pete's conduct "in private meetings with Rupp, Shomaker, and Lavelle," and its finding that "the complaints *focused upon* Pete's hostility toward Stewart because of his friendship with Breaud." *Stewart* at 2211 (emphasis supplied). The court's reliance on private communication as an indication that speech concerns purely personal matters has been rejected by this Court. *Givhan* recognized that:

> [n]either the Amendment itself nor our decisions indicate that this freedom [of speech] is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public. We decline to adopt such a view of the First Amendment.

*Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 415-416, 99 S. Ct. 693, 697-98 (1979). This *Givhan* observation was reiterated in *Rankin*, 483 U.S. at 386 n.11, in which this Court rejected a suggestion of the United States that the private nature of Rankin's speech vitiated the status of the speech as addressing a matter of public concern.

The *Givhan* quotation is especially apt when, as here, the employee speaks as a whistle-blower by "bring[ing] to light actual or potential wrongdoing or breach of public trust." *Connick*, 461 U.S. at 148. This Court has recognized that speech on public issues, such as sexual harassment in a government workplace, occupies the "'highest rung of the hierarchy of First Amendment values' and is entitled to special protection." *Connick*, 461 U.S.

145, 103 S. Ct. at 1689 (quoting and citing NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913, 102 S. Ct. 3409, 3425 (1982); Carey v. Brown, 447 U.S. 455, 467, 100 S. Ct. 2286, 2293 (1980)). Revelations of wrongdoing are seldom revealed in speeches to the public at large, but are of no less concern to the public than if they were.

The fact that petitioner's speech may have included complaints about Pete's abuse of himself is irrelevant to the issue whether the *portion* of his speech reporting alleged sexual harassment of a co-worker is of public concern. In *Connick*, this Court found that Myers' questionnaire as a whole "touched upon matters of public concern in only a most limited sense," *Connick*, 103 S. Ct. at 1694-95, but held that "[b]ecause *one of the questions* in Myers' survey touched upon a matter of public concern ... we must determine whether Connick was justified in discharging Myers" under the *Pickering* balancing test. *Connick*, 103 S. Ct. at 1691 (emphasis added). Even conceding *arguendo* that petitioner's speech was "focused upon" his own harassment, the Second Circuit observed:

> That the underlying events [of gender based discrimination and violations of the Freedom of Information Act] were primarily of significance to Donahue and his wife neither diminishes the public importance of these concerns nor strips his speech of protection.

*Donahue v. Windsor Locks Board of Fire Commissioners*, 834 F.2d 54, 58 (2d Cir. 1987) (citing *Givhan*). Likewise the Seventh Circuit has recognized that:

> **The fact that the plaintiff also sought damages for alleged wrongs [of personal concern] is not enough to keep Rice's actions from being a matter of public concern. If that be the test,**

> **only one not aggrieved could raise a protected matter of public concern, and even the few would-be plaintiffs that could meet this test might find the courthouse door blocked by principles of standing. Even if the plaintiffs themselves viewed their problems as only a personal matter, the test of public concern is more objective.**

*Auriemma v. Rice*, 910 F.2d 1449, 1460 (7th Cir. 1990).

Also unlike the employee in *Connick*, petitioner did not speak as an employee dissatisfied with personnel decisions or the legitimate status quo. Because sexual harassment is illegal, speech reporting such is *per se* outside the realm of legitimate personnel matters; an employee cannot be speaking "as an employee" when he or she alleges sexual harassment. Rather, allegations of sexual harassment involve a matter of public concern requiring a *Pickering* balancing of interests.

## CONCLUSION

Sexual harassment in the workplace is unquestionably a matter of public concern. By holding that petitioner's speech reporting sexual harassment did not involve a matter of public concern, the Fifth Circuit's decision conflicts with the precedents of this Court and with the decisions of several other circuits. The Fifth Circuit's decision is wrong as a matter of policy as well as of law. It restricts protection of public employees who report sexual harassment, and thus will frustrate laws designed to eliminate sexual harassment in the workplace by discouraging the intervention of co-workers. Petitioner respectfully requests this Court to review the Fifth Circuit's decision.

# APPENDIX

# APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 91-3078

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STANLEY J. STEWART,
Plaintiff-Appellant,

versus

PARISH OF JEFFERSON, et al.,
Defendants-Appellees.

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Appeal from the United States District Court
for the Eastern District of Louisiana
(CA 89-5367 L)

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(January 28, 1992)

Before CLARK, Chief Judge, JONES, Circuit Judge and PARKER, District Judge (sitting by designation).

ROBERT M. PARKER, District Judge:

Appellant Stanley J. Stewart (Stewart) filed suit against the Parish of Jefferson (Parish), Harold Pete (Pete), and Harold Shomaker (Shomaker) [sic] for violation of Stewarts [sic] First Amendment right to free speech, violation of Stewart's civil rights under 42 U.S.C. § 1983, and pendant state law tort claims.

The Honorable Veronica D. Wicker, United States District Judge for the Eastern District of Louisiana, New Orleans Division, granted Pete's Motion to dismiss and subsequently granted summary judgment in favor of the Parish and Shomaker [sic]. In this appeal, Stewart challenges both actions of the district court. For the reasons stated below, we affirm.

Stewart began his employment with the Jefferson Parish Department of Public Works in August, 1970. Stewart eventually was promoted to the position of Engineering Inspector II. He developed a friendship with a co-worker, Joyce Breaud, who was also an Engineering Inspector II. Their immediate supervisor was Pete, who, in turn, was supervised by Shomaker. Shomaker's immediate superior was William Lavalle, Director of the Department of Public Works.

During their tenure with the Department of Public Works, Breaud and Pete entered into a rather stormy personal relationship which endured for a number of years. The demise of this relationship, in late 1987, is at the root of this lawsuit.[1] Not only did Pete and Breaud engage in verbal confrontations at work, but Stewart alleges that Pete subjected him to harassment because of his friendship with Breaud, including repeated inquiries as to Breaud's afterhours activities. Stewart asserts that this verbal harassment included threats of demotion.

In January, 1988, Stewart and Breaud met with Shomaker to complain of Pete's alleged sexual harassment of Breaud and his related harassment of Stewart. Stewart had previously spoken with the Department of Public Works Personnel supervisor, Phil Rupp, who had instructed him to file an official complaint. Stewart asserts that Pete's harassment intensified after the complaint to the point that, on January 22, 1988, Stewart left work following a confrontation with Pete and checked

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[1] Stewart alleges that Breaud was coerced into the relationship. This allegation, while deplorable if true, is not relevant to the resolution of this appeal.

himself into the Ochsner Hospital Psychiatric Unit. He was diagnosed as suffering from an acute anxiety attack and subsequently underwent stress relaxation therapy at the hospital.

In March, 1988, Breaud and Stewart brought their complaints to Shomaker's superior, Lavelle. At that time, they were removed from Pete's supervision and placed under the supervision of Larry Nalty. Breaud was subsequently transferred to another Department of Public Works section. In June, 1988, Pete retired. Following Pete's retirement, Shomaker became Stewart's supervisor. Stewart asserts that Shomaker harassed him by overburdening him with work and adding duties for which he was not previously responsible, such as parkway work. He further asserts that Shomaker was unfriendly toward him. In December, 1988, Stewart was assigned to the drainage inspection team. The assignment was made by Bill Sneed, who had replaced Lavelle as Director of the Department of Public Works. Stewart declined to perform the assignment because of his fear of snakes and rodents, often found in the drainage system. Rather than accept the assignment, Stewart transferred to the sign department as a Sign Technician I.[2] The transfer was made in January, 1989. Although the salary for a Sign Technician I was somewhat lower than Stewart's previous salary, his overall income increased due to overtime pay. Stewart perceived the transfer as a demotion and his anxiety symptoms returned. He stopped working on August 3, 1989. He filed this lawsuit on December 15, 1989.

Stewart raises two issues on appeal. He first contends that the district court erred in granting summary judgment as to his claims against the Parish and Shomaker. In his second issue, Stewart challenges the district court's order granting Pete's Motion to Dismiss.

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[2] One of the employees in the sign department transferred to Stewart's job. Stewart asserts that this person was not required to perform drain inspection and that, following the transfer, no one performed that duty.

I.

Stewart's challenge of the summary judgment is based on the district courts [sic] determination that Stewart's speech was not a matter of public concern warranting First Amendment protection. The inquiry into the protected status of speech is one of law and, as such, is subject to *de novo* review by this Court. *See Kirland v. Northside Independent School Dist.*, 890 F.2d 794, 798 (5th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 2620, 110 L.Ed.2d 641 (1990); *Terrell v. University of Texas System Police*, 792 F.2d 1360, 1362 n.2 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064, 107 S.Ct. 948, 93 L.Ed.2d 997 (1987). We have, therefore, considered the entire record in order to determine whether the district court properly resolved this legal question.

The issue of whether an employee's speech involves a matter of "public concern" is a slippery inquiry, one which defies precise definition. It thus requires a case-by-case analysis, with careful consideration of the content, context, and form of the statement. *Kirkland*, 890 F.2d at 798. When a public employee speaks *as an employee* rather than as a citizen on matters that address his personal employment conditions, First Amendment protection is not invoked absent unusual circumstances. *See Ayoub v. Texas A & M University*, 927 F.2d 834, 837 (5th Cir.1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 72, 116 L.Ed.2d 46 (1991) (*citing Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983)). This focus upon the role of the speaker is warranted by the realistic observation that "almost anything that occurs within a public agency could be of concern to the public." *Ayoub*, 927 F.2d at 837 (*quoting* 792 F.2d at 1362).

Review of the record as a whole leads this Court to the conclusion reached by the district court. Although Stewart vehemently asserts that the content of his speech concerned sexual harassment of Breaud, the facts are more indicative of what amounted to an unpleasant work environment. The demise

of the long-term relationship between Breaud and Pete was apparently played out at the office in a particularly hostile and childish fashion with Stewart becoming involved due to his friendship with Breaud.[3]

While the working conditions which prompted Stewart's complaints were at best unsatisfactory, the record indicates that the content of his speech concerned the personal abuse of Stewart by Pete because of his friendship with Breaud. The content of Stewart's speech on behalf of Breaud is likewise questionable. This Court is cognizant of sexual harassment in the workplace, but the facts of this case are more indicative of a soured personal relationship than sexual harassment.

The context and form of Stewart's speech also mitigate against First Amendment protection. Stewart's complaints were made verbally in private meetings with Rupp, Shomaker, and Lavelle. As noted above, the complaints focused upon Pete's hostility toward Stewart because of his friendship with Breaud. The record clearly indicates that Stewart was speaking *as an employee* upon matters only of personal interest.

In summary, our review of the record leads us to the conclusion that Stewart's speech did not involve a matter of public concern. The district court made the correct decision on this question of law and properly granted summary judgment in favor of the Parish and Shomaker.

II.

In his second issue, Stewart contends that the district court improperly granted Pete's Motion to Dismiss on the

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[3] In a letter written by Stewart, purportedly on the advise of counsel, to the Jefferson Parish Councilmen prior to the filing of this suit, he characterized the "sex scandal" as arguments between Pete and Breaud at the time of their breakup which made the office environment unpleasant. (Record pp. 282-90). This letter does not mention Pete's alleged sexual demands on Breaud.

grounds of prescription because Stewart was unaware that he had been injured by Pete until August 3, 1989.

The parties agree that the applicable prescriptive period in this case is one year. The crux of this issue is the point at which the one year period commenced. Stewart asserts that the harassment he suffered at the hands of Pete left him with a "smoldering problem" that erupted into a disabling mental disorder one and one-half years later, rendering him unable to work. Pete asserts that the prescriptive period should have begun no later than the time of Pete's retirement in June, 1988.

The statute of limitations period commences once the plaintiff acquires possession of two critical facts: (1) an injury has occurred; and (2) the identity of the person who inflicted the injury. *Lavelle v. Listi*, 611 F.2d 1129, 1131 (5th Cir.1980). The prescriptive period will not commence prior to the time the plaintiff is *or should be* aware of the causal connection between his injury and the acts of the defendant. *Id.*

The undisputed facts of this case clearly indicate that the prescriptive period had run as to Pete by the time Stewart filed suit. Stewart's complaints regarding Pete's harassment in late 1987 and early 1988 culminated in the meeting with Lavelle in March, 1988. At that time Stewart was removed from Pete's supervision and any direct harassment from Pete ceased. Stewart has had no contact with Pete since Pete's retirement in June, 1988. It is further undisputed that Stewart went to the hospital on January 22, 1988, following a confrontation with Pete. At that time he was suffering from an acute anxiety attack, and he subsequently underwent stress therapy at the hospital. It appears that Stewart's disabling condition was triggered by events which occurred after Pete's retirement. In a letter from R. John Wakemen, Ph.D., Program Director of the Ochsner Hospital's Stress Treatment Center, dated August 2, 1989, he noted Stewart's successful completion of the Stress Management Workshop in 1988. The letter proceeds with a discussion of Stewart's "recent resurgence of anxiety" and other symptoms brought on by the

"gradually deteriorating work situation" described by Stewart upon his return to the hospital on June 26, 1989. (Record pp. 28-29).

It is clear to this Court that Stewart possessed the critical fact of injury as early as January, 1988. At that time he knew or should have known he had been injured by Pete. The district court correctly granted Pete's Motion to Dismiss.

The judgment of the district court is AFFIRMED.

# APPENDIX B

MINUTE ENTRY
WICKER, J.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

| | |
|---|---|
| STANLEY J. STEWART | CIVIL ACTION |
| VERSUS | 89-5367 |
| PARISH OF JEFFERSON, ET AL | SECTION "L" (6) |

The defendants Harold Pete, Harold Schomaker and the Parish of Jefferson filed motions to dismiss, or alternatively for summary judgment. On an earlier date, the Court granted the motion of defendant Pete based on prescription and took the motions of Schomaker and Jefferson Parish under submission.

After considering the record, the briefs of counsel, the evidence submitted and the applicable law, the Court now GRANTS the remaining defendants' motions to dismiss or alternatively for summary judgment for the reasons which follow.

The following facts gave rise to this lawsuit:

Plaintiff, Stanley Stewart, and Joyce Breaud were Engineer Inspectors II with Jefferson Parish Street Department in the Department of Public Works. Their immediate supervisor was Harold Pete. Pete's supervisor was Harold Schomaker. In early 1988, Stewart and Breaud complained to Schomaker that Pete was sexually and verbally harassing Breaud and verbally harassing Stewart because of Stewart's friendship with Breaud. In March, 1988, Stewart made the same complaints to William Lavelle, Schomaker's supervisor in the Department of Public

Works. That same month Stewart began reporting to a supervisor other than Pete and two months later Breaud was transferred to a different office. In December, 1988, Stewart was assigned to the drainage inspection team. When he refused to enter the drains, Stewart was reassigned to the sign department as Sign Technician I where he remained until he resigned in August 1989.

In his complaint, Stewart alleged that he was forced to accept a demotion [to Sign Technician I] and was so verbally and emotionally abused at work that he finally had to resign. Stewart sued for damages in Count I based on alleged violations of his first amendment rights, in Count II under 42 USC § 1983 and in Count III under state tort law.

All parties submitted evidence in support of and in opposition to these motions. Therefore the Court considered them under the standard for motions for summary judgment rather than for motions to dismiss. FRCP 12(b)(6). Under F.R.C.P. 56(c), summary judgment is appropriate when the evidence shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 2552 - 2553, 91 L. Ed. 2d 265 (1986). Upon review, the Court finds that summary judgment is appropriate in this case. *Page v. DeLaune*, 837 F. 2d 233 (5th Cir. 1988).

## COUNT ONE: FIRST AMENDMENT RIGHTS

A public employee who contends that his rights under the first amendment were violated by his employer must first establish that his speech addressed a matter of public concern. "The courts will not interfere with personnel decisions 'when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest.' [Citations omitted.]" *Page*, 837 F. 2d at 237. To determine whether the speech of a particular employee addresses

a matter of public concern, the Court must look at the content, form, and context of a given statement, as revealed by the whole record. *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 1690, 75 L. Ed. 2d 708, 728 (1983).

The first question then is whether Stewart's reporting of Pete's alleged sexual and verbal harassment of Breaud and of Pete's verbal harassment of Stewart, was speech addressing "a matter of public concern." If it was not, then the speech was not protected by the first amendment and no further inquiry is needed. In making this determination, the mere fact that the topic of the employee's speech was one of arguable public interest is not controlling "[b]ecause almost anything that occurs within a public agency could be of concern to the public." *Terrell v. University of Texas System Police*, 792 F. 2d 1360, 1362 (5th Cir. 1986, *cert denied*, ___ U.S. ___, 107 S. Ct. 948, 93 L. Ed. 2d 997 (1987) [The personnel policies of university police were not of public concern.] Rather the Court looks at whether the speech at issue in a particular case was made primarily in the plaintiff's role as citizen or primarily in his role as employee. *Id.*

> Speech by public employees may be characterized as not of "public concern" when it is clear that such speech deals with individual personnel disputes and grievances and that the information would be of no relevance to the public's evaluation of the performance of governmental agencies. *Davis v. West Community Hospital*, 755 F. 2d 455, 461 (5th Cir. 1985). [Isolated disputes among doctors and other professional at a public hospital were not of public concern.]

*See also Connick v. Myers*, 461 U.S. 138, 148 - 149, 103 S. Ct. 1684, 1690-91, 75 L. Ed. 2d 708 (1983) [The transfer policies and morale problems of a district attorney's office were not of public concern]; *Day v. South Park Independent School District*,

768 F. 2d 696 (5th Cir. 1985), *cert. denied*, 474 U.S. 1101, 106 S. Ct. 883, 88 L. Ed. 2d 918 (1986) [An unfavorable employee evaluation was not of public concern.] *Compare Rankin v. McPherson*, ___ U.S. ___, 107 S. Ct. 2891, 2897-98, 97 L. Ed. 2d 315 (1987) [An employee's comments to a co-worker about the President's welfare policies and an attempt on the President's life were of public concern]; *Pickering v. Board of Education*, 391 U.S. 563, 571, 88 S. Ct. 1731, [THIS LINE ILLEGIBLY PRINTED]
the need of a school system for a tax increase was of public concern]; *Johnson v. Harris County Flood Control Dist.*, 869 F. 2d 1565, 1577 (5th Cir. 1989) [Testimony under oath at an EEOC hearing was of public concern]; *Thomas v. Harris County*, 784 F. 2d 648, 653 (5th Cir. 1986) [Complaints about special police treatment for a wealthy subdivision was of public concern]; *Wells v. Hico Independent School District*, 736 F. 2d 243, 249 (5th Cir. 1984), *cert. denied*, 473 U.S. 901, 106 S. Ct. 11, 87 L. Ed. 2d 672 (1985), [Public criticism at a School Board meeting about a controversial, federally funded reading program was of public concern]; *Gonzales v. Benavides*, 712 F. 2d 142 (5th Cir. 1983) [Public denial of the power of County Commmissions to oversee a community action program was of public concern.]; *Von Ooteghem v. Gray*, 628 F. 2d 488 (5th Cir. 1980) [Speech to the Commissioners Court about the civil rights of homosexuals was of public concern.]

Upon review of the evidence submitted, the Court finds that Stewart's reporting to Schomaker that alleged facts of Pete's harassment of Breaud and Pete's harassment of Stewart himself when Stewart refused to tell Pete about Breaud's off duty activities was more directed to "individual personnel disputes and grievances and that the information would be of no relevance to the public's evaluation of the performance of governmental agencies." *Davis*, 755 F. 2d at 461. In particular, the depositions, affidavits and exhibits verify the following sequence of events. Breaud and Pete had been dating for many years and they fought

all the time. (P. Exhibit G.) Breaud was scared of Pete and afraid that she'd lose her job. (Breaud deposition, p. 12.) Breaud used to cry to Stewart and "when Joyce and Pete fought, everyone suffered." (Stewart deposition, p. 50.) On one occasion, Pete "busted" Stewart's door open and said, "If you don't tell me [about Breaud], I can make it hard for you and you'll be demoted." On another occasion, Pete came into Stewart's office and screamed, "I want to see you." (Stewart deposition, p. 42 - 50.) Stewart told Schomaker of Pete's harassment of Breaud in January and February, 1988. Stewart told Lavelle, Schomaker's supervisor, of Pete's harassment in March, 1988. (Stewart affadavit.) In March, 1988, Breaud got married, and was then transferred in May, 1988. (Stewart deposition, p. 67.) No one replaced Breaud so Stewart got her work to do as well as his own. (Stewart deposition, p. 67.) Also in March, 1988, Stewart began reporting to Nalty of the road maintenance department but his job was the same as before. (Schomaker affidavit; Stewart deposition pp. 68 - 69.) Pete retired in June 1988. In August, 1988, after Pete retired, Stewart got more work of the kind that he was not used to. He had a lot of parkway work and checking lots and trees. Schomaker was not friendly and did not talk to him. (Stewart deposition, p. 67.) It was Bill Sneed, Director of Public Works, not Schomaker, who assigned Stewart to the draining inspection team in December, 1988. (Stewart deposition, pp. 68-69; Schomaker affidavit.) When Stewart refused to enter the drains, he switched with someone who was not happy in the sign department, but the sign man who replaced him did not have to go down into the drains. No one took that job. (Stewart deposition, p. 75.) Stewart's pay increased from 1981 through 1988. (P. Exhibit F.)

The opposition relies heavily on *Johnson* in which the Fifth Circuit found that "[w]hen an employee testifies before an official government adjudicatory or fact finding body, he speaks in a context that is inherently of public concern." 861 F. 2d at

1578.[1] However in this case, the alleged protected speech was not given under oath or in the context of any agency or governmental hearing. It was presented to the appropriate supervisory personnel within the Jefferson Parish Department of Public Works. "The fact that the communications ... were in house does not necessarily destroy their protection under the first amendment, but it is part of the context of the communication to be considered in determining whether the speech addressed a matter

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1 The attempt to bring this case within the *Johnson* holding is evident by the use of the word "witness" in the plaintiff's complaint. At para. XI, Stewart states:

> That Breaud in order to substantiate her complaint requested that plaintiff serve as witness on her behalf and *plaintiff, accordingly, did come forward and reported his information to Schomaker.* However, Schomaker took no responsive action and Pete continued his ongoing extortion of Breaud and his harassment of the plaintiff. That *defendants, Pete and Schomaker's harassment of Stewart were based solely on his association with Breaud and his witnessing and speaking on her behalf.*

At para. XIII, Stewart states:

> That despite the transfer of Breaud and the forced retirement of Pete, defendant Schomaker continued to harass and threaten plaintiff *in retaliation for speaking as a witness on behalf of Breaud.*

At para. XIV, Stewart states:

> That plaintiff, *by exercising his right of free speech and association by reporting the hostile and discriminatory environment and unlawful activities with in the Department of Public Works was addressing a matter of public concern and accordingly, plaintiff's speech and conduct was constitutionally protected.* (Emphasis provided.)

of public concern." *Davis*, 755 F. 2d at 461.

Upon review, the Court finds that the content, form, and context of Stewart's statements to Schomaker, as revealed by the the depositions, affidavits and exhibits, are more analogous to the content, form and context of the employee's speech in *Connick, Terrell, Davis*, than to that of *Johnson*. While not minimizing the serious nature of the allegations, the Court finds that Stewart's speech concerned individual personnel disputes and not matters of public concern.

The opposition also relies on *Van Ooteghen* and its admonition that

> The state cannot prevent the speech of its citizen absent a compelling state interest. ... In the employment context, this compelling state interest standard is satisfied only upon proof that the regulation of speech was necessary to prevent "a material and substantial interference" with the operation of the public department. 628 F. 2d at 492

Before reaching the issue of whether there was a compelling state interest to restrict an employee's speech, the plaintiff must show that the speech was protected. Sexual harassment on the job is a matter of public concern and speech attendant thereto may be protected. However, under the facts of this case, the Court finds that Stewart has not shown that his speech was of such public concern as to warrant first amendment protection. Therefore the Court need not consider the other alleged issues presented.

Finally the opponent argues that the motions should be denied because in *Donahue v. Windsor Locks Br. of Fire Commissioners* 834 F. 2d 54, 58 (5th Cir. 1987), the Fifth Circuit said that "[s]ummary judgment is inappropriate where the allegation

is that action was taken in relatiation [sic] for an exercise of constitutionally protected freedoms." *Donahue* is distinguishable. In *Donahue*, the Fifth Circuit found that the plaintiff's claim of gender based discrimination and Freedom of Information Act violations were both matters of public concern so the plaintiff had overcome the first hurtle of establishing that the rights asserted were protected under the first amendment. In this case, Stewart has not established that his speech was of public concern to bring the first amendment protections into play, so summary judgment on that issue is not precluded by *Donahue*. *See generally, Page, supra.*

COUNT TWO §1983 claim

F.R.C.P. 56(c) "mandates the entry of summary judgment after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 2552 - 2553, 91 L. Ed. 2d 265 (1986). "To recover on a first amendment claim under §1983, a plaintiff must demonstrate that his conduct is deserving of first amendment protection and the defendants' conduct of harassment was motivated by or substantially caused by his exercise of free speech. *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 471 (1977)." *Donahue*, 834 F. 2d at 58.

In this case, the plaintiff has failed to show that his speech was of public concern as to warrant the protection of the first amendment. Accordingly, the plaintiff's claim under 42 USC § 1983 must also fall.

## STATE LAW CLAIMS

In Count III, the plaintiff brought a claim under Louisiana state law for damages allegedly caused by the defendants' intentional infliction of emotional distress. Because there is no complete diversity between the parties, jurisdiction attaches to the state claim only as pendent to the federal claims. Since both of those federal claims have been dismissed, it is within the Court's discretion to keep or not to keep the remaining state claim. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 86 S. Ct. 1130, 1139, 16 L. Ed. 2d 218 (1966);

> Merely because the federal court has the jurisdiction or power to hear a state law claim does not mean that the district court must exercise that power. 383 U.S. at 726, 86 S. Ct. at 1139. Moreover *Gibbs* cautions that "[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surefooted reading of applicable law." 383 U.S. at 726, 86 S. Ct. at 1139 (footnote omitted). *Kaplan v. Clear Lake City Water Authority*, 794 F. 2d 1059, 1064 (5th Cir. 1986).

In light of such factors as judicial economy, convenience and fairness to the litigants [*Ingram Corp. v. J. Ray McDermott & Co., Inc.*, 698 F. 2d 1295, 1318-1320 (5th Cir. 1983)], the Court declines to exercise its jurisdiction over this pendent state law claim in this instance, but its dismissal will be without prejudice. *Hamill v. Wright*, 876 F. 2d 1032 (5th Cir. 1989).

Accordingly and or the foregoing reasons, IT IS ORDERED that Counts I and II of the plaintiff's complaint be DISMISSED WITH PREJUDICE and that Count III of the

plaintiff's complaint be DISMISSED WITHOUT PREJUDICE.

New Orleans, Louisiana, this 7th day of January, 1991.

/S/

VERONICA D. WICKER
UNITED STATES DISTRICT JUDGE

# APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

| | |
|---|---|
| STANLEY J. STEWART | CIVIL ACTION |
| VERSUS | NO. 89-5367 |
| PARISH OF JEFFERSON, ET AL | SECTION "L" |

## JUDGMENT

Defendants motion to dismiss or alternatively for summary judgment having been granted; accordingly:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the defendants and against plaintiff dismissing Counts I and II of plaintiff's complaint with prejudice and at his costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the defendants and against plaintiff dismissing Count III of the plaintiff's complaint at his costs and without prejudice.

New Orleans, Louisiana, this 9th day of January, 1991.

/S/ Veronica D. Wicker

_____

United States District Judge

# APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 91-3078

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STANLEY J. STEWART,
Plaintiff-Appellant,

versus

PARISH OF JEFFERSON, ET AL.,
Defendants-Appellees.

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Appeal from the United States District Court for the
Eastern District of Louisiana

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion January 28, 5 Cir., 1992, ___ F.2d ___)

(February 26, 1992)

Before JONES, Circuit Judge and Parker,**

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/ Edith H. Jones 2/24/92

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United States District Court REHG-6

**District Judge of the Eastern District of Texas, sitting by designation.

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